

No. 83-224

In The
Supreme Court of the United States
October Term, 1982

ADAMS CENTRAL SCHOOL DISTRICT NO. 090 and
EDUCATIONAL SERVICE UNIT No. 9,

Petitioners,

vs.

MARVIN DEIST and MYRTLE DEIST,

Respondents,

IMPLEADED WITH NEBRASKA DEPARTMENT
OF EDUCATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF NEBRASKA

BRIEF IN OPPOSITION OF RESPONDENTS
MARVIN DEIST and MYRTLE DEIST

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September 9, 1983

QUESTIONS PRESENTED FOR REVIEW

Whether the Nebraska Supreme Court's application of state statute independently and adequately supports that court's ordering reimbursement to the parents of a multiply handicapped child for expenses which they incurred in procuring a residential educational program for that child after his wrongful expulsion from a special education program.

TABLE OF CONTENTS

	Pages
Questions Presented For Review	i
Table of Authorities	iii
Jurisdiction	1
Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Denying the Writ:	
I. Petitioners' Motion for Rehearing of this Case Is Presently Pending Before the Supreme Court of the State of Nebraska.	8
II. The Judgment of the Nebraska Supreme Court in this Case Is Supported Independently and Ad- equately by State Law.	8
III. The Judgment of the State Court Relative to the Questions Presented For Review Herein Does Not Conflict with Judgments of the Eighth Circuit Court of Appeals.	11
IV. The Order of the Nebraska Supreme Court Awarding Tuition Reimbursement to the Parents of an Unlawfully Expelled Handicapped Child and Denying Compensatory Education to Said Child Does Not Conflict with Federal Court Judgments.	14
Conclusion	17
Appendices:	
Appendix A	App. 1
Appendix B	App. 14

TABLE OF AUTHORITIES

	Pages
CASES:	
<i>Adams Central School District No. 090 v. Deist</i> , 214 Neb. 307, — N. W. 2d — (1983).....	6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16
<i>Board of Education v. Rowley</i> , — U. S. —, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982)	13
<i>Edelman v. Jordan</i> , 415 U. S. 651 (1974)	15
<i>Miener v. State of Missouri</i> , 673 F. 2d 969 (8th Cir. 1982)	11, 12, 13, 14, 15, 16, 17
<i>Monahan v. State of Nebraska</i> , 687 F. 2d 1164 (8th Cir. 1982)	11, 12, 13, 14
CONSTITUTION:	
Constitution of the United States, Eleventh Amendment	15, 16, 17
STATUTES:	
20 U. S. C. §§ 1401-1415	2, 3, 4, 8, 9, 12
Neb. Rev. Stat. §§ 43-601 to 43-666 (Cum. Supp. 1982)	2, 3, 9, 10
Neb. Rev. Stat. § 84-917 (Reissue 1981)	2, 6, 7
REGULATIONS:	
45 C. F. R. 121a.504 (1977)	2, 4
45 C. F. R. 121a.505 (1977)	2, 4

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STATE OF NEBRASKA**

**BRIEF IN OPPOSITION OF RESPONDENTS
MARVIN DEIST and MYRTLE DEIST**

The respondents, Marvin Deist and Myrtle Deist, respectfully request that this Court deny the petition for writ of certiorari seeking review of the opinion of the Nebraska Supreme Court in this case. That opinion is reported at 214 Neb. 307, — N. W. 2d — (1983).

JURISDICTION

Petitioners have invoked this Court's jurisdiction under 28 U. S. C. § 2101 and United States Supreme Court Rule 17.

The judgment of the Supreme Court of Nebraska in this case was entered on May 13, 1983. On June 10, 1983, petitioners filed a motion for rehearing of the case by the Nebraska Supreme Court. As noted in the Petition, at page 6, that motion for rehearing had not been decided by the Nebraska Supreme Court at the time of the filing of the Petition for Writ of Certiorari on August 10, 1983, and petitioners' motion for rehearing at this instant continues its pendency before the Nebraska Supreme Court. It therefore appears that the application for writ of certiorari has been brought out of time, fails to satisfy the requirements of United States Supreme Court Rule 20.4, and should be denied.

Respondents Marvin Deist and Myrtle Deist assert a lack of jurisdiction in this Court under United States Supreme Court Rule 17 for the reason that the decision of the Supreme Court of Nebraska in this case either fails to raise a federal issue or fails to decide a federal question so as to create a conflict with any other decision of a federal court of appeals.

STATUTES AND REGULATIONS INVOLVED

Federal Statutes and Regulations

20 U. S. C. §§ 1400, *et seq.*

45 C. F. R. §§ 121a.504, 121a.505 (1977).

State Statutes

NEB. REV. STAT. §§ 43-601 to 43-666 (Cum. Supp. 1982).

NEB. REV. STAT. § 84-917 (Reissue 1981).

STATEMENT OF THE CASE

Marvin Deist and Myrtle Deist, respondents [hereinafter, "Deists"], commenced this case in July 1979, as a special education administrative hearing before the Nebraska Department of Education. They brought their action pursuant to 20 U.S.C. § 1415 (1976) and NEB. REV. STAT. § 43-661 (Reissue 1978), on behalf of their son, David Deist, who was at that time a fifteen-year-old, multiply handicapped child suffering from mental retardation, autism, and epilepsy. The Deists named as respondents in their action the petitioners herein, Adams Central School District No. 090 [hereinafter, "school district"], the school district of residence of David Deist, and Educational Service Unit No. 9 [hereinafter, "ESU"], an agency which had provided special education services to David Deist pursuant to a contract between the ESU and the school district. The Nebraska Department of Education was also named as a respondent. The Deists alleged that David Deist had been deprived by the three respondents of the free, appropriate public education to which he was entitled under both state and federal law.

The Nebraska Department of Education was dismissed as a party during pre-hearing proceedings. An administrative hearing on the merits commenced on March 10, 1980, and a final decision and order were issued in September 1980. [Text of Final Decision and Order appears herein at Appendix A.] Evidence adduced at the administrative hearing established that David Deist had been enrolled in a special education program in Adams Central School District until sometime in December, 1977; that during the latter part of that month he had been ex-

pelled from school because of his disruptive behavior in class; that his expulsion amounted to a change in placement made in violation of 20 U.S.C. § 1415 and specifically in violation of the regulations applicable when a special education placement is changed, because the Deists had not received proper notice of the change or been advised of their right to a due process hearing to contest the change. See 45 C.F.R. 121a.504, 121a.505, complete texts of which appear at Appendix B. The evidence also showed that the school district, subsequent to his expulsion, offered him no alternative temporary or long-term placement. Faced with the school district's failure to offer any program for David Deist, the child's parents placed him, in late December 1977, at the Hastings Regional Center, a state-operated mental hospital located in Adams County, Nebraska. David Deist resided in a locked, adult male ward in that institution from December 1977 through May 1979, during which period of time the school district offered no alternative placement for him.

David Deist was totally deprived of any special education programming during much of his stay at the Hastings Regional Center. While the school district at times sent teachers to provide "homebound instruction" for David Deist in the hospital setting for periods of one to two hours per day, frequently there were no teachers available for that work and no such instruction was provided. When instructors were available, they were often persons without any teaching certification or special education skills. During the course of his institutionalization, David Deist deteriorated greatly and lost many of the language and social skills he had mastered prior to his Hastings Regional Center placement.

Evidence further established that in May 1979 the Deists were notified by Hastings Regional Center that that institution intended to discharge David Deist, believing that he was unsuitably placed there. Unable to find any other suitable placement for David Deist within the state of Nebraska and with the school district still offering no placement of any kind for the child, his parents removed David Deist to Nebraska Psychiatric Institute. That institution is a short-term psychiatric care facility located in Omaha, Nebraska, at a great distance from the Deist family home. David Deist remained a resident at Nebraska Psychiatric Institute from May 1979 until the administrative hearing on the merits of the special education appeal.

Based on the evidence adduced, the hearing officer found that David Deist had been unlawfully expelled from his special education placement in December 1977, in violation of state and federal regulations; that David Deist was in need of a residential placement as an element of an adequate educational program; and that his parents' placements of David Deist initially at the Hastings Regional Center and later at Nebraska Psychiatric Institute were not voluntary and unilateral placements, but were actions necessitated by the school district's expulsion of the child and its subsequent failure to offer any alternative placement for him.

The Order required that Adams Central School District provide a transfer of David Deist from Nebraska Psychiatric Institute to an appropriate residential placement; that the school district pay all the residential expenses which had been incurred at Hastings Regional

Center and at Nebraska Psychiatric Institute; and that compensatory education be provided David Deist for a period of 16 months after his 21st birthday.

The school district and the ESU elected to appeal the hearing officer's order within the state court system and petitioned for a review by the District Court of Adams County, Nebraska. The review was sought pursuant to NEB. REV. STAT. § 84-917 (Reissue 1981). [Text of the statute appears at Appendix B, herein.] A review was conducted by the district court; however, no record of the review proceeding was preserved. In June 1981, the District Court of Adams County reversed the rulings of the hearing officer. [The Order of the District Court appears at Petition, p. C-6.]

The Deists appealed from the district court determination to the Nebraska Supreme Court. On May 13, 1983, the Nebraska Supreme Court entered an order affirming in part and reversing in part the original order of the hearing officer. Specifically, the Nebraska Supreme Court affirmed those elements of the order which required that the school district provide a residential placement for David Deist and that David Deist's parents be reimbursed for the costs of the residential placements necessitated during the duration of his unlawful expulsion. The court reversed the hearing officer's order providing compensatory education, finding that the "clear and unambiguous language" of the Education for All Handicapped Children Act limits eligibility to children under age 21. *Adams Central School District v. Deist*, 214 Neb. 307 at 325, — N. W. 2d —, —, (1983) [hereinafter, *Deist*].

In June 1983, the school district and the ESU filed a Motion for Rehearing of the case by the Nebraska Supreme Court. That motion has been submitted and is pending decision by the Nebraska Supreme Court at this time.

The status of the Nebraska Department of Education throughout this case bears comment for purposes of clarification. That Department was originally named as a respondent by the Deists at the administrative hearing level, but was dismissed as a party at that stage. Subsequently, the Department was impleaded as a respondent by the school district and the ESU at the time of the review hearing in the state district court. The Nebraska Supreme Court appears to have taken the position that the Nebraska Department of Education was not a party whose interests were subject to definition by that body on appeal, presumably because of the limited nature of the review sought by the school district and the ESU under NEB. REV. STAT. § 84-917 [see Appendix B], and because of the fact that the Department had been dismissed as a party at the administrative level. The Department of Education made no appearance in the Nebraska Supreme Court, and, subsequent to the entry of the judgment in *Deist*, the Department requested and was granted by the Nebraska Supreme Court leave to file a brief, not as a party but as an *amicus*, on behalf of the school district's motion for rehearing.

REASONS WHY WRIT SHOULD BE DENIED

I. Petitioners' Motion for Rehearing of This Case is Presently Pending Before the Supreme Court of the State of Nebraska.

As noted in the foregoing JURISDICTION section, petitioners have filed their application for writ of certiorari during the pendency before the Nebraska Supreme Court of their motion for rehearing, which was submitted to that court on August 8, 1983, and which at this instant remains undecided. Petitioners have thus failed to comply with the requirements of United States Supreme Court Rule 20.4, which specifies that the time for the filing of a petition for certiorari shall commence with the date of the denial of rehearing or of the entry of a subsequent judgment upon rehearing. Absent a ruling by the Nebraska Supreme Court on petitioner's motion for rehearing, there exists no jurisdiction in this Court for a grant of certiorari.

II. The Judgment of the Nebraska Supreme Court in This Case is Supported Independently and Adequately by State Law.

The two Questions Presented for Review by the petition in this case raise the issues of whether and to what extent damages may be available under the Education for All Handicapped Children Act, 20 U. S. C. §§ 1401 *et seq.* [hereinafter, EAHCA]. However, the decision of the Nebraska Supreme Court in *Deist* with regard to those issues did not rely primarily upon considerations of federal law, but was independently and alternatively support-

ed by provisions of the Nebraska statutory scheme relating to services for handicapped children, NEB. REV. STAT. §§ 43-601 to 43-666 (Cum. Supp. 1982). Examination of the *Deist* opinion discloses on its face the adequacy and independence of the state ground.

In addressing the question whether reimbursement relief should be made available to the parents of David Deist, the Nebraska Supreme Court focused initially on its finding of fact that David Deist had been wrongfully expelled by the Adams Central School District from his special education placement. The Nebraska court based that finding on the school district's having deprived the Deists of the procedural protections mandated by 20 U. S. C. §§ 1401-1415, and the school district's having expelled David Deist on account of disruptive behavior, without having inquired into whether his disruptive behavior was in fact caused by his handicapped condition. *See Deist, supra*, at 321.

Having made the initial finding of an unlawful expulsion of David Deist, the Nebraska Supreme Court proceeded to examine the issues of the availability and the extent of appropriate damages. While it examined relevant federal statutory and case law for guidance, as it might examine the precedents of other jurisdictions, the Nebraska court relied specifically upon NEB. REV. STAT. § 43-662.01 (Cum. Supp. 1982). That statute provides that "the hearing officer shall prepare a final decision and order directing *such action as may be necessary*" [emphasis added]. *Deist, supra*. The court found in the state

statute an adequate ground for the award of damages by the administrative hearing officer.

The Nebraska Supreme Court, after analysis construing NEB. REV. STAT. § 43-662.01 as supporting an award of compensation when necessary, proceeded to consider whether the circumstances of the Deist matter justified the precise award ordered by the hearing officer, that is, whether the Deists were entitled to reimbursement for tuition expenditures. The court concluded that there did exist a factual basis sufficient to justify the hearing officer's award of reimbursement, consistent with the authority vested in that officer by NEB. REV. STAT. § 43-662.01, and based on the fact that the damages sustained by the Deists were caused by the school district's unlawful exclusion of David Deist from any educational program.

It has been the consistent practice of this Court, because of its respect for the independence of state courts, to refrain from reviewing the decisions of state courts where those decisions rest independently and alternatively on state statutory bases and do not necessarily raise a federal issue. Such is clearly the case in this matter.

While petitioners assert that a ruling by this Court is necessary to determine whether the Supreme Court of Nebraska has correctly construed EAHCA, such is not the case. In actuality, the Nebraska Supreme Court in *Deist* construed a state statute as providing for the award of compensation to the parents of an unlawfully expelled, handicapped child for expenses incurred as a direct result of the child's expulsion from school and the failure of the local school district to afford any alternative place-

ment for the child. That construction of the state statute by the Nebraska Supreme Court establishes an adequate and independent basis for the award of reimbursement to respondent Deists without raising any reviewable federal question.

III. The Judgment of the State Court Relative to the Question Presented For Review Herein Does Not Conflict With Judgments of the Eighth Circuit Court of Appeals.

If it is assumed, *arguendo*, that the judgment of the state court in *Deist* so relied on provisions of EAHCA that its construction of that statute presents a federal question, it is nonetheless clear that the court's interpretation of the Act does not conflict with constructions by the Eighth Circuit Court of Appeals so as to demand a clarifying review by this Court, contrary to petitioners' assertions.

Petitioners posit generally that monetary damages are not authorized under EAHCA and, specifically, that the holding in *Deist* is in clear conflict with the holdings of the Eighth Circuit Court of Appeals in the cases *Miener v. State of Missouri*, 673 F. 2d 969 (8th Cir. 1982) [hereinafter *Miener*] and *Monahan v. State of Nebraska*, 687 F. 2d 1164 (8th Cir. 1982) [hereinafter, *Monahan*]. Petitioners rely on that alleged conflict as a basis for review by this Court, and suggest that to allow the *Deist* decision to stand in the face of *Miener* and *Monahan* would leave all school districts in Nebraska without any definite body of law to follow.

In fact, review of the *Miener* and *Monahan* decisions immediately reveals the distinguishability of those cases, on their facts, from *Deist*, and the absence of any conflict among their holdings.

The *Miener* case was decided by the Eighth Circuit Court of Appeals in February 1982, and involved a claim for general damages asserted by the parents of a handicapped child under EAHCA and other federal statutes. The court denied an award of damages in *Miener*, finding a damage remedy not "generally intended" under EAHCA, and finding in that case an absence of such "exceptional circumstances" as might in other factual situations warrant a limited damage award. *Miener, supra*, at 980. In discussing "exceptional circumstances," the *Miener* court noted that these might include factors such as a school district's egregious failure to comply with the procedural provisions of EAHCA or risk to a child's physical health occasioned by the placement offered by a school district. *Miener, supra*.

The most significant difference between the factual situations presented in *Miener* and in *Deist* is that while the *Miener* court found no suggestion of exceptional circumstances, the Nebraska Supreme Court in *Deist* relied explicitly on the presence of two exceptional circumstances to support its affirmation of the limited damage award. Those circumstances were: first, the school district's failure to comply with the procedural provisions of 20 U.S.C. §§ 1401-1415; and, second, the threat to David Deist's physical and emotional health posed by his exclusion from any meaningful educational program as a result of his long-term, unlawful expulsion.

The first "exceptional circumstance" identified in *Deist* corresponds precisely to the first identified by the *Miener* court and discussed above, that is, an egregious deprivation of due process protections. The second exceptional factor present in *Deist* is more extreme than the second identified by *Miener*: David Deist was not merely threatened in some aspect of his physical well-being by a feature of an offered program; he actually experienced physical and emotional deterioration attributable to a total deprivation of meaningful programming upon his expulsion by the school district. In *Board of Education v. Rowley*, — U. S. —, 102 S. Ct. 3034 (1982), this Court noted that a primary purpose of EAHCA was to "open the door of public education to handicapped children," *Rowley, supra*, at 3043. In this case, the school district closed the door of opportunity to David Deist and abandoned him outside it.

A second distinction to be made between *Deist* and *Miener* is that while the plaintiffs in the latter case sought a general award of damages, the Deists sought and received precisely the type of "limited damage award" which the *Miener* court identified as "appropriate in special circumstances." *Miener, supra*, at 980.

The *Monahan* case, *supra*, the only other Eighth Circuit decision which petitioners cite as conflicting with *Deist*, was decided in August 1982 subsequent to *Miener*. While denying damages to plaintiffs in *Monahan*, the court specifically reiterated the position which it had asserted in *Miener*, that damages may be available "in exceptional circumstances not present here." *Monahan, supra*, at 1169.

The facts of the *Monahan* case differ from those of *Deist* in that the placement of his handicapped child for which the *Monahan* plaintiff sought reimbursement was truly a voluntary placement. That is, in *Monahan*, the parent had independently made a placement of his child even though an alternative program was offered by the local school district and was available at all times. The handicapped child in *Monahan* had not been expelled or otherwise totally excluded from access to an educational program, as was David Deist. Thus, *Monahan* did not present the "exceptional circumstances" which the Eighth Circuit Court in both *Monahan* and *Miener* identified as establishing a basis for damage awards.

In light of the clear distinguishability of these cases on their facts, it is evident that *Deist* presents no conflict with either *Monahan* or *Miener* on the issue of the availability of damages under the EAHCA, and that petitioners are clearly in error in their assertion that a review of *Deist* by this Court is required to resolve a conflict between Nebraska and federal courts on that issue.

IV. The Order of the Nebraska Supreme Court Awarding Tuition Reimbursement to the Parents of an Unlawfully Expelled Handicapped Child and Denying Compensatory Education to Said Child Does Not Conflict With Federal Court Judgments.

The second of petitioners' Questions Presented for Review asserts an inconsistency in the Nebraska Supreme Court's award of tuition reimbursement to David Deist's parents, on the one hand, and its declining to award com-

pensatory education past David Deist's 21st birthday, on the other. Petitioners suggest that this judgment of the Nebraska Supreme Court conflicts with the case law of the Eighth Circuit, citing the *Miener* case, *supra*, in support of that contention.

In *Miener*, the court discussed the question of the types of damages which may be available *against a state* and the types which may be barred by virtue of a state's Eleventh Amendment immunity. Within the context of discussion of the scope of Eleventh Amendment immunity and exceptions to such immunity, the *Miener* court offered an analysis which distinguished between prospective and retrospective damages. Basically, the court reiterated the case law established in *Edelman v. Jordan*, 415 U.S. 651 (1974), and stated the position that while prospective relief may be ordered against a state as an exception to Eleventh Amendment immunity, retrospective relief will not be permitted because of Eleventh Amendment constraints. The court concluded that the Eleventh Amendment would bar the award *against a state* of both compensatory education orders and tuition reimbursement orders, for the reason that both may be viewed as forms of retrospective relief.

The damages issue in *Deist* is very different from the one discussed in *Miener* for the reason that *Deist* presents no Eleventh Amendment immunity issue. The Nebraska Supreme Court order was directed against the school district and not against the state. Further, in *Deist* no party has ever raised any claim to Eleventh Amendment immunity. The Petition has not drawn into question the con-

stitutionality of any Act of Congress or of any statute of the State of Nebraska, and petitioners have neither articulated an Eleventh Amendment issue in their Questions Presented for Review nor satisfied the requirements of United States Supreme Court Rules 28.4(b) and 28.4(c). Because of the absence of that issue in *Deist*, the Eighth Circuit analysis of the Eleventh Amendment question has no clear or direct bearing on the determination by the Nebraska Supreme Court.

In the absence of an Eleventh Amendment issue, the Nebraska Supreme Court simply held that eligibility for the educational services mandated by EAHCA ends when a student reaches the age of 21, and that, therefore, relief in the form of an order for appropriate educational services could not extend beyond a student's 21st birthday. The Nebraska Supreme Court made no reference to prospective or retrospective relief because no Eleventh Amendment issue was presented to the court. Petitioners have explicitly acknowledged the limitations of their argument. *See* Petition, p. 13. They are essentially asking the Court to review an abstract issue and to compare not real inconsistencies in judgment, but rather, differences in the approaches and in the general principles utilized by the state court in *Deist* and by the federal court in *Miener* in those courts' analyses of different issues.

In essence, petitioners are urging this Court to dictate that the Nebraska Supreme Court, rather than making a practical construction of the relevant statutory language, as it did, *Deist, supra*, at 321, ought to have applied to the issue of compensatory education precisely the analy-

tical model which *Miener* utilized in its treatment of the compensatory education issue within the context of Eleventh Amendment immunity considerations.

Petitioners have not cited to a single case involving a judgment in clear conflict with that of the Nebraska Supreme Court in its order of tuition reimbursement and its denial of compensatory education. Rather, they have isolated out of its context the *Miener* determination that compensatory education could not be ordered *against a state* and have urged this Court to hold that the Nebraska Supreme Court erred in not reaching an identical judgment relative to a non-state party.

When they urge this Court to find that identical models of analysis ought to have been applied by two different courts in the handling of different issues, petitioners are actually seeking what would amount to an advisory opinion rather than a clear judicial determination. The absence of a clear conflict between the Nebraska Supreme Court judgment and that of any federal court warrants this Court's determination that no reviewable issue has been raised in the second Question Presented.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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App. 1

APPENDIX A

**BEFORE THE NEBRASKA DEPARTMENT
OF EDUCATION**

Case No. 79-08

MARVIN DEIST and MYRTLE DEIST,
Petitioners,

vs.

**ADAMS CENTRAL SCHOOL DISTRICT NO. 090,
ADAMS COUNTY, NEBRASKA, EDUCATIONAL
SERVICE UNIT #9, and the NEBRASKA DEPART-
MENT OF EDUCATION,**

Respondents.

FINAL DECISION AND ORDER

I.

APPEARANCES

Present at the hearing in this matter which commenced on March 10, 1980, at Educational Service Unit # 9, Hastings, Nebraska, were the Petitioners, Marvin Deist and Myrtle Deist, and their attorneys, Tim Sindelar and Marie Ashe, both of Lincoln, Nebraska.

Orwin White, Superintendent of Adams Central School District, Respondent, and Gil Feis, State-Federal Programs Director of Educational Service Unit #9, Respondents, were present with their attorney, John Recknor of Lincoln, Nebraska.

II.

JURISDICTION

This action was brought by the Petitioners under Nebraska Statute § 43-661, R. R. S. 1943, and 20 U. S. C. § 1415 of the Education of the Handicapped Act.

III.

ISSUES PRESENTED FOR FINAL DECISION

The issues presented to the Hearing Officer were many. However, in the final analysis, the numerous issues presented can all be classified under three general issues:

(1) What constitutes a free appropriate education for David Deist?

(2) Has the education provided David Deist since December, 1977 constituted a free appropriate public education?

(3) If David Deist has not received a free appropriate public education from and after December, 1977, is he entitled to any remedy, and if so, what remedy?

IV.

SPECIFIC FINDINGS OF FACT

A. FINDINGS RELATING TO JURISDICTION

This tribunal has jurisdiction over the subject matter of all Petitioners' claims against Respondents and jurisdiction over the persons of all named parties in the caption of this matter with the exception of the Nebraska

App. 3

Department of Education, which has been dismissed from this action.

B. FINDINGS RELATING TO THE ISSUES

A significant body of documentary evidence and testimony has centered on the issue of David Deist's primary diagnosis. The question of whether David is primarily autistic, as opposed to mentally retarded, has been a much discussed topic. No finding is made with respect to this debate. Resolution of this issue is unnecessary in this matter. Regardless of the primary diagnosis, it is unquestioned that David Deist is a multihandicapped child with extensive educational needs. It is these needs which are more clearly at issue. Also at issue is the extent to which Respondents may be compelled to meet those needs.

The needs of David are obviously many. The IEP of September 18, 1979, implemented by Respondents without the consent of Mr. and Mrs. Deist appears to satisfactorily address David's many needs with only one exception, that being the injection of a community based residential placement.

The evidence in this matter is uncontroverted that David is in need of residential placement to complement and complete his existing IEP. Dr. John McGee, Dr. Michael O'Neill, and Dr. Frank Menolascino each testified unequivocally that residential placement should be an integral part of David's education.

The Hearing Officer therefore finds that residential placement in or near this community is a necessary element of free and appropriate public education to which David Deist is entitled under the law.

A second issue presented is the adequacy of David's education since his removal from the TMR (Trainable

Mentally Retarded) School in December, 1977. His education is seen in two separate phases, the first being his placement in the Hastings Regional Center from January, 1978 through May 11, 1979 and the second extending from May 11, 1979, when David was transferred to the Nebraska Psychiatric Institute in Omaha to the time of the hearing in this matter.

During David's placement at the Hastings Regional Center, he resided in a locked adult male ward, although he was not kept there at all times during the day. For the better part of his stay, he received between one and two hours of homebound instruction per day. Little or no progress was noted. If anything, David regressed. Dr. Michael O'Neill testified that in his opinion, two hours per day of homebound instruction was inadequate for David's needs. The record reflects nothing to contradict this opinion. This leads the Hearing Officer to the conclusion that David's education at the Hastings Regional Center undeniably failed to meet his right to a free appropriate public education.

David's residence at the Nebraska Psychiatric Institute has been another matter. It appears to have been quite appropriate, except for the absence of a proper residential placement. Progress has been noted to the extent that David is now, and has been for some time, ready for transfer to this community. This proposed transfer contemplates residential placement.

The final issue presented for consideration is directly related to the second issue. Having determined the inappropriateness of at least a part of David's past education, what relief may be afforded? Petitioners first

App. 5

asked that Respondents be required to pay all residential expenses incurred at the Hastings Regional Center for David's placement. They secondly request an Order requiring Respondents to provide compensatory education beyond the age of 21. The specific findings in connection with these requests are as follows:

(A) Residential placement in a public or private program is necessary to meet David Deist's special education needs.

(B) This necessity arose in December, 1977 and January, 1978 and continued to exist through the time of the hearing in this matter.

(C) The public residential placement at the Hastings Regional Center has been unsatisfactory in terms of special education services provided, and in terms of the placement itself.

(D) The public residential placement at the Nebraska Psychiatric Institute has been satisfactory in terms of special education services provided, but has not been the least restrictive environment.

(E) Residential expenses have been incurred at both institutions.

(F) Mr. and Mrs. Deist, Petitioners, made both placements without the knowledge or consent of Respondents.

(G) Petitioners' placement of David at the Hastings Regional Center in January, 1978 is directly attributable to Respondents' wrongful removal of David Deist from the existing special education program at the TMR School in December, 1977.

App. 6

(H) Respondents' removal of David from the TMR School in December, 1977 constituted a change in David's educational placement, as well as a change in the manner of providing him a free appropriate public education.

(I) Petitioners' placement of David at the Nebraska Psychiatric Institute in May, 1979 is directly attributable to David's regression at Hastings Regional Center and failure to obtain a satisfactory community based residential placement for David.

(J) David's placements at Hastings Regional Center and at Nebraska Psychiatric Institute were not for medical reasons.

V.

CONCLUSIONS OF LAW

David Deist was wrongfully removed from the TMR School in December, 1977. His parents were not given proper notice of this change in placement. See 45 C. F. R. § 121a.504(a). Nor was the removal accomplished in accordance with the then existing Nebraska Department of Education Rule 51. See NDE Rule 51-(5)(a), effective August 16, 1977 (Exhibit 22). David's removal was in fact an unlawful expulsion. *Stuart v. Nappi*, 443 F. Supp. 1235 (1978).

David was placed in Hastings Regional Center soon thereafter, and his special education was in a holding pattern at best. He was not receiving, during his stay at the Regional Center, a free appropriate public education as defined in 20 U. S. C. § 1401(18), in any respect. The

App. 7

removal of David to the Nebraska Psychiatric Institute in May, 1979 improved his situation, but in light of the evidence and the "least restrictive environment" requirements of state and federal law, he was still not receiving the free appropriate public education to which he is entitled. NDE Rule 51-(6)(a), effective November 9, 1978; 45 C. F. R. § 121a.550 et seq.

Given the foregoing, the final determination to be made is the propriety of the relief sought by Petitioners. They first ask that David be placed in a community based residential placement at the expense of the local school district.

Where it is determined that residential placement is necessary to provide special education and related services to a handicapped child, it shall be done at no expense to the parents. 45 C. F. R. § 121a.302.

While ultimate responsibility for payment of the costs attendant to a residential placement lies with the State Department of Education (45 C. F. R. § 121a.600), the immediate responsibility lies with the local school district which, in this case, is Adams Central School District. *Ladson v. Board of Education of D. C.*, — F. Supp. — (D. D. C., March 12, 1979), 3 EHLR 551:188; *North v. D. C. Board of Education*, 471 F. Supp. 133 (1979).

David's right to residential placement in or near this community, at the expense of the Adams Central School District, is well founded in the facts and in the law.

Petitioners also seek relief in the nature of an Order by this Hearing Officer directing the Respondents to pay the expenses of residential care incurred during David's

stays at the Hastings Regional Center and the Nebraska Psychiatric Institute. In addition, they have requested compensatory education for David beyond age 21.

The relief sought is in the nature of money damages. One court has held that the Education of the Handicapped Act (20 U. S. C. 1401 et seq.) does not imply a cause of action for money damages. *Loughran v. Flanders*, 470 F. Supp. 110 (1979). The majority of courts, however, recognize a right to assert a claim for money damages. *Doe v. Koger*, 480 F. Supp. 225 (1979); *Boxall v. Sequoia Union High School District*, 464 F. Supp. 1104 (1979).

The court in *Boxall* specifically held that the Education of the Handicapped Act authorizes an award for damages, when appropriate. *Id.* at 1112. The court looked to the legislative intent and found the following discussion:

Such action may be brought in any State court of competent jurisdiction or in any district court of the United States and in any such action the court shall receive the records of the due process hearing (and where appropriate the records of the review of such hearings), shall hear additional evidence at the request of any party, shall make an independent decision based on the preponderance of the evidence, and *shall grant all appropriate relief*. (Emphasis added.) Joint Explanatory Statement of the Committee of Conference, in Senate Conference Report No. 94-455, p. 50, reprinted in (1975) U. S. Code Cong. and Admin. News, pp. 1425, 1503.

This comment should be compared with recently enacted LB 855 (which amended Nebraska Statute § 43-662, R. R. S. 1943), which states that “. . . the Hearing Officer shall prepare a final decision and order directing such action as may be necessary. . . .”

Doe v. Koger, supra, is somewhat similar to David Deist's situation. A handicapped child was expelled from school due to disruptive behavior. The court stated that a school district has the same authority to expel handicapped children as it does to expel nonhandicapped children. However, the Education of the Handicapped Act does impose upon the school district a duty to make an independent determination of whether the disruptive behavior, which is the cause for the disciplinary action, is attributable to the child's handicap. If so, expulsion is inappropriate. Rather, the school district in that event must seek to place the child in an appropriate, more restrictive environment. The court noted that disruptive behavior may often be attributable to an existing inappropriate placement.

The court went on to suggest by way of dicta certain prerequisites to any recovery of damages. They appear to be:

- (1) Expulsion by the school district caused the child to lose education;
- (2) The child would not have been expelled if the Education of the Handicapped Act had been followed; and,
- (3) The child's propensity to disrupt was the result of the child's inappropriate placement. *Doe* at p. 229.

The record clearly shows that all three parts of the foregoing test are met in the case of David Deist. See also *S-1 v. Turlington*, — Fed. 2d — (5th C. C. A. 19), 3 EHLR 551:572.

Even though the foregoing test is satisfied, parents do not have an unrestricted right to transfer their chil-

dren to another placement. The placements at the Hastings Regional Center and Nebraska Psychiatric Institute were both made unilaterally by David's parents without prior knowledge or consent of Respondents. The Fourth Circuit of the United States Court of Appeals recently held that such a unilateral move by the parents precludes them from any right to look to the school board for payment of such expenses. *Stemple v. Board of Education of Prince George's County*, 623 Fed. 2d 893 (1980).

The facts in *Stemple*, however, are distinguishable from the Deists' situation. The initial conduct of the Respondents in removing David from the TMR School, and the subsequent failure to find proper placement for David for a great length of time while he was at the Hastings Regional Center precipitated the conduct of the Deists. The conduct of the Deists was not so much "unilateral," at [sic] it was a logical result of the conduct of the Respondents. See *Board of Education of the Town of Manchester v. Connecticut State Board of Education*, — A. 2d — (Conn. Sup. Ct., February 26, 1980), 3 EHLR 551:556.

The question remains then of what relief is appropriate and necessary under the facts of this case. Residential placement of David Deist has been a necessity since December, 1977. This is a part of the free appropriate public education which is to be provided at no expense to the parents. 45 C. F. R. § 121a.302. It follows then that an Order directing the school district to pay the residential expenses incurred at the Hastings Regional Center and the Nebraska Psychiatric Institute is both appropriate under the circumstances and necessary to give full effect to the Education of the Handicapped Act. The school district is, of course, entitled to look to any insurer or

similar third party for coverage or reimbursement where appropriate. 45 C. F. R. § 121a.301.

The other damage-related type of relief requested by Petitioners is compensatory education for David beyond age 21. This type of relief has little precedent. Petitioners cite as authority for this request *Boxall v. Sequoia Union High School District, supra*, and *Mattie T. v. Holaday*, — F. Supp. —, (N. D. Miss., January 26, 1979), 3 EHRLR 551:109. *Boxall*, as already stated, holds generally that damages may be awarded under the Education of the Handicapped Act. It does not, however, suggest what types of relief may or may not be appropriate. No reference is made therein to future compensatory education.

Mattie T. is a consent decree wherein future compensatory education beyond age 21 was granted in certain circumstances. Unfortunately, no discussion of the issue is found in the case, and it is therefore of little practical help in the case at bar.

The basis for requesting compensatory education beyond age 21 is the inadequate education David received while at the Hastings Regional Center. There can be no question that David lost something, and it is something which may be lost forever. Lost education has been termed "irreparable harm." *Doe v. Koger, supra*. Time and opportunity have been lost. Nevertheless, it is intriguing to consider the possibility of restoring to David this lost time and opportunity over some period in the future. The facts of this case and the nature of David's disabilities lend themselves to this type of relief.

David has needed, while at the Regional Center, and continues to need, a very structured special type of education which includes residential placement. There is no reason to believe that David could not benefit from such education beyond the age of 21. Such relief, while not specifically authorized in state or federal legislation, is certainly compatible with the declared spirit and intent of such legislation. § 43-641 R. R. S. 1943; 20 U. S. C. 1401, et seq. Such relief is appropriate under the circumstances and is necessary to effect a realization of a free appropriate public education for David.

The foregoing findings and conclusions are not meant to suggest in any way that Respondents have ignored David or given his needs less than their full attention. Their sincere concern and continuous cooperation with the Deists demonstrates unquestionable good faith. Nevertheless, David was provided something less than a free appropriate public education while at the Hastings Regional Center.

There have been courts which have denied similar relief to parents where good faith has been demonstrated on the part of the school district. *Laura M. v. Special School District No. 1*, — F. Supp. — (D. Minn., January 21, 1980), 3 EHRLR 552:152; *Halderman v. Pennhurst State School and Hospital*, 446 F. Supp. 1295 (1977). In this case, however, the lack of accomplishment has served to erode the good faith. The underlying purpose of the Education of the Handicapped Act is to place the burden of a free appropriate public education upon the state education agencies, and in turn, the local school district. This burden dictates accomplishment of those goals by those agencies responsible.

Respondents in their Brief place much emphasis on their extraordinary efforts in connection with this matter. They take the position that they have done all they are able to do. In the first place, it is certainly not clear that they have exhausted all possible avenues. Secondly, and more importantly, the lack of staff or facilities does not excuse the local school district from its duty to provide a free appropriate public education. *Sherry v. New York State Education Department*, 479 F.Supp. 1318 (1979). The burden of providing David Deist with a free appropriate public education remains with the Adams Central School District.

VI.

ORDER

IT IS, THEREFORE, ORDERED AS FOLLOWS:

(1) David Deist shall immediately be transferred from the Nebraska Psychiatric Institute, Omaha, Nebraska, to a residential placement sufficient to meet David's unique needs, all at the expense of Adams Central School District No. 090;

(2) Adams Central School District No. 090 shall be responsible for payment of all residential expenses incurred by David Deist at the Hastings Regional Center and the Nebraska Psychiatric Institute; and

(3) Adams Central School District No. 090 is hereby directed to provide David Deist with a free appropriate public education for a period of sixteen (16) months after David's 21st birthday.

This Order shall take effect thirty (30) days after receipt of a copy of same by the parties.

Dated: September 22, 1980.

/s/ Michael E. Sullivan,
Hearing Officer

APPENDIX B

Nebraska Revised Statutes (Reissue 1981)

84-917. *Agency; final decision; appeal; district court; procedure.* (1) Any person aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, is entitled to judicial review under sections 84-917 to 84-919. Nothing in this section shall be deemed to prevent resort to other means of review, redress, or relief provided by law.

(2) Proceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken within thirty days after the service of the final decision by the agency. All parties of record shall be made parties to the proceedings for review. Summons shall be served as in other actions except that a copy of the petition shall be served upon any such agency together with the summons. The court, in its discretion, may permit other interested persons to intervene.

(3) The filing of the petition or the service of summons upon such agency shall not stay enforcement of a decision. The agency may do so, or the court may order a stay after notice to such agency of application therefor, upon such terms as it deems proper, and may require the party requesting such stay to give bond in such amount and conditioned as the court may direct.

(4) Within fifteen days after service of the petition or within such further time as the court for good cause shown may allow, the agency shall prepare and transmit to the court a certified transcript of the proceedings had before it including the final decision sought to be reversed,

vacated, or modified. Any deposition or exhibit introduced in the agency proceeding shall, upon demand of the party who introduced it, be returned to such party for use in the proceedings for review.

(5) The review shall be conducted by the court without a jury on the record of the agency.

(6) The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because the agency decision is:

- (a) In violation of constitutional provisions;
- (b) In excess of the statutory authority or jurisdiction of the agency;
- (c) Made upon unlawful procedure;
- (d) Affected by other error of law;
- (e) Unsupported by competent, material, and substantial evidence in view of the entire record as made on review; or
- (f) Arbitrary or capricious.

(7) The review provided by this section shall not be available in any case where other provisions of law prescribe the method of appeal.

Source: Laws 1963, c. 531, § 1, p. 1664; Laws of 1969, c. 838, § 2, p. 3162.

Nebraska Revised Statutes (Cum. Supp. 1982)

43-662. *State Department of Education; conduct hearings; hearing officers; employed; qualifications.* The

State Department of Education shall conduct hearings, initiated under section 43-661, using hearing officers. The State Department of Education may employ, retain, or approve such qualified hearing officers as are necessary to conduct hearings provided by sections 43-626, 43-627.01, and 43-661 to 43-668. The hearing officers shall not be persons who are employees or officers of a state or local public agency which is involved in the education or care of the child. A person who otherwise qualifies to conduct a hearing under sections 43-626, 43-627.01, and 43-661 to 43-668 is not an employee of the agency solely because the person is paid by the agency to serve as a hearing officer. No hearing officer shall participate in any way in any hearing or matter in which the hearing officer may have a conflict of interest.

Source: Laws 1978, LB 871, § 5; Laws 1980, LB 855, § 1. Effective date July 19, 1980.

43-662.01. *Hearing; hearing officer; report; contents; final decision and order; delivery.* Upon the receipt of a petition, the State Department of Education shall assign it to a hearing officer. The hearing officer shall receive all subsequent pleadings and shall conduct the hearing. At the hearing the parties shall present evidence on the issues raised in the pleadings. At the completion of the proceedings the hearing officer shall prepare a report based on the evidence presented containing findings of fact and conclusions of law. Within forty-five days after the receipt of a request for a hearing, the hearing officer shall prepare a final decision and order directing such action as may be necessary. At the request of either party the hearing officer may grant specific extensions of time

App. 17

beyond this period. The report and the final decision and order shall be delivered via certified mail to each party or attorney of record and to the Commissioner of Education.

Source: Laws 1980, LB 855, § 2. Effective date July 19, 1980.

45 C. F. R.

§ 121a.504 *Prior notice; parent consent*

(a) *Notice.* Written notice which meets the requirements under § 121a.505 must be given to the parents of a handicapped child a reasonable time before the public agency:

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child, or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child.

(b) *Consent.* (1) Parental consent must be obtained before:

(i) Conducting a preplacement evaluation; and

(ii) Initial placement of a handicapped child in a program providing special education and related services.

(2) Except for preplacement evaluation and initial placement, consent may not be required as a condition of any benefit to the parent or child.

(c) *Procedures where parent refuses consent.* (1) Where State law requires parental consent before a handi-

capped child is evaluated or initially provided special education and related services, State procedures govern the public agency in overriding a parent's refusal to consent.

(2) (i) Where there is no State law requiring consent before a handicapped child is evaluated or initially provided special education and related services, the public agency may use the hearing procedures in §§ 121a.506-121a.508 to determine if the child may be evaluated or initially provided special education and related services without parental consent.

(ii) If the hearing officer upholds the agency, the agency may evaluate or initially provide special education and related services to the child without the parent's consent, subject to the parent's rights under §§ 121a.510-121a.513.

§ 121a.505 *Content of notice.*

(a) The notice under § 121a.504 must include:

(1) A full explanation of all of the procedural safeguards available to the parents under Subpart E;

(2) A description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, and a description of any options the agency considered and the reasons why those options were rejected;

(3) A description of each evaluation procedure, test, record, or report the agency uses as a basis for the proposal or refusal; and

(4) A description of any other factors which are relevant to the agency's proposal or refusal.

(b) The notice must be:

(1) Written in language understandable to the general public, and

(2) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(c) If the native language or other mode of communication of the parent is not a written language, the State or local educational agency shall take steps to insure:

(1) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;

(2) That the parent understands the content of the notice, and

(3) That there is written evidence that the requirements in paragraph (c) (1) and (2) of this section have been met.